

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-1031

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PJS

To be argued by  
CONSTANCE CUSHMAN

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

Docket No. 76-1031

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

CHARLES BRADLEY,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

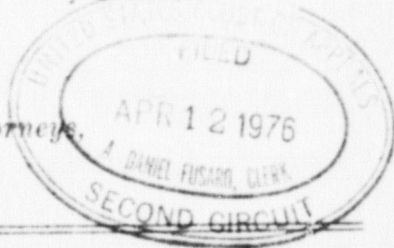
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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Charles Bradley appeals from a judgment of conviction entered on January 20, 1976 in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Robert L. Carter, United States District Judge, and a jury.

Indictment 75 Cr. 690, filed July 11, 1975, charged Bradley in Count I with uttering a forged United States Treasury check in violation of 18 U.S.C. § 495, and in Count II with possession of stolen mail in violation of 18 U.S.C. § 1708.

Trial commenced on November 13, 1975. On November 14, 1975 the jury convicted Bradley on both counts.

On January 20, 1976 Judge Carter sentenced Bradley to concurrent terms of one year's imprisonment on each

count, the execution of all but 30 days of which was suspended.

Bradley is presently free on his own recognizance pending determination of this appeal.

### **Statement of Facts**

#### **The Government's Case**

On April 14, 1975, a man entered 4091 Broadway Check Cashing, a check cashing store, and presented a check to the owner, Mr. Castro Padilla, who at that time was on duty behind one of the check cashing windows (Tr. 21).<sup>\*</sup> The check was a United States Treasury check, payable to Frances Berger, in the amount of \$215.53 (GX 1). Mr. Padilla testified that the man endorsed the check in his presence (Tr. 24-25), and that Mr. Padilla questioned him, because "Frances" was a woman's name (Tr. 21). As identification, the man offered a social security card and draft card bearing the name Frances Berger, and Mr. Padilla wrote the numbers from the cards on the check (Tr. 21). Those cards (GX 2, 3), which were shown to the jury, were deeply erased, with the name Frances Berger obviously superimposed by an inexperienced hand. At trial Padilla identified the numbers on the check as being in his handwriting (Tr. 22).

Padilla, telling the man he was going to call his boss for authorization, instead called the United States Postal Inspectors, and shortly thereafter three Inspectors arrived at the store. Mr. Padilla pointed out to them the man

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<sup>\*</sup> References to Government Exhibits and pages of the trial transcript are abbreviated herein, respectively, as "GX" and "Tr."

who had presented and signed the check, and gave the Inspectors both the check and the identification cards (Tr. 28-29).

Inspector John Dolan testified that he and another agent entered 4091 Broadway Checking Cashing on April 14, 1975, spoke to Mr. Padilla, received the check and cards, and went over to Charles Bradley, whom he identified in court. His fellow inspector advised Bradley of his *Miranda* rights, whereupon Bradley immediately stated that he was Frances Berger, and strenuously insisted that it was his check and that he lived at the address printed on the check, 66 Post Avenue. Bradley assented to the Inspectors' proposal to go to that address to verify his claim (Tr. 41-43, 46).

En route, however, Bradley admitted that he was not Frances Berger, but rather Charles Bradley. He further stated that a friend of his, "Tony," had given him the check, that it was Tony's check, and he had cashed it as a favor to Tony, who had been outside the check cashing store when Bradley and the Inspectors left (Tr. 46).\*

Upon arriving at Post Avenue and Academy Street, Bradley and the Inspectors were joined by Postal Inspector Edward Jones who likewise identified the defendant in Court (Tr. 70-71). At the Post Avenue location Bradley told the agents that Tony had other checks under a stairwell in a building at Academy Street and Post

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\* In contrast, the government proved that the check represented a tax refund for 1974 for a *Mrs.* Frances Berger, who resided at 66 Post Avenue. Mrs. Berger testified that her mail box had been broken into on April 14, 1975 (Tr. 16), that she had never received the check, much less endorsed or authorized anyone else to endorse it for her (Tr. 14-15), and that she did not know Charles Bradley (Tr. 17) or anyone in her neighborhood named Tony (Tr. 18).

Avenue, and that Tony lived nearby. Inspector Jones searched the area of the stairwell and found only a screwdriver and a pair of tweezers. He also inquired at the location Bradley had said Tony lived, and found no one who knew a "Tony" (Tr. 71-72).

Thereupon Inspector Jones took Bradley to the Bronx General Post Office, where Bradley signed a Warning and Waiver form (Tr. 72), and then to the offices of the United States Secret Service, where Bradley, in Inspector Jones' presence, made an oral statement to Secret Service Agent Charles Boland, which was transcribed and then signed (Tr. 75-77). That statement (GX 9) repeated that the check was Tony's and that Bradley had tried to cash it as a favor to him.\* Mr. Bradley also gave handwriting exemplars at that time (Tr. 82).

Mr. Knel Hagopian testified that he was a photo technician at the Regiscope Corporation of America, which serviced the regiscope or camera device at 4091 Broadway Check Cashing (Tr. 56). He described the manner in which the camera's operator places an identifying number on the check, and then takes a simultaneous photograph of the check and the individual cashing it (Tr. 55). Mr. Hagopian testified concerning the photographs taken by that camera between April 12 and 14, 1974. The camera had been broken, its shutters malfunctioning, and while it did take pictures of persons standing in

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\* At page 7 of Appellant's brief the following representation is made concerning Bradley's statements to the several agents: "According to the appellant, Tony had asked him to go inside and cash the check using the two pieces of identification and to mention his name (Tony) to the owner of the establishment. The defendant stated that Tony endorsed the check in his presence" (emphasis added). The italicized portions of that representation are nowhere supported by the evidence at trial.

front of the cashier's window, at times it did not record the check, or recorded only half a check. An entire roll of film was thus defective. Mr. Hagopian was able to identify, by the identifying regiscope number, one photograph on that roll as being that of the Frances Berger check, and he testified that the check had been cashed at 4091 Broadway between April 11 and April 15, 1975 (Tr. 59-63). That part of the photograph showing the people outside the cashier's window, however, did not show Mr. Bradley,\* nor was his picture among those taken immediately prior to or immediately after that of the Frances Berger check. On April 15, 1975, the camera was repaired (Tr. 60).

### **The Defense Case**

After a ruling at the close of the Government's case, that the Government would be permitted to inquire, on cross-examination of Mr. Bradley, into a 1969 New York State conviction for petty larceny, a misdemeanor, defendant's attorney represented to Judge Carter that he intended to put in a defense (Tr. 98).

The next morning, however, defendant's counsel learned that the Government had obtained an opinion from a handwriting expert that Mr. Bradley had written the "Frances Berger" endorsement on the back of the check, and proposed to use that opinion to rebut any claim by Mr. Bradley that he had not written that endorsement. In view of that possible testimony, the defense rested, having offered no evidence (Tr. 104).

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\* The picture (GX 5), which was shown to the jury, did not show anyone directly in front of the cashier's window. It showed several people nearby who appeared to be standing in line.

## ARGUMENT

## POINT I

**The trial court correctly denied Bradley's request that the jury be instructed in accordance with the so-called "two-inference rule."**

Judge Carter declined Bradley's request to charge the jury in accordance with the so-called "two inference rule"—that is, where two inferences may be drawn from circumstantial evidence, one favoring guilt and one favoring innocence, the jury must draw that favoring innocence (Tr. 151). Acknowledging that that refusal so to charge was an entirely correct application of the settled decisional law of this Circuit, *e.g.*, *United States v. Pfingst*, 477 F.2d 177, 197 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973); *United States v. Grunberger*, 431 F.2d 1062, 1066 (2d Cir. 1970), Bradley urges this Court to overturn that authority. Whether any panel of this Court, acting alone, could do so is doubtful. *See, e.g.*, *United States v. Loschiavo*, Dkt. No. 75-1310 (2d Cir. March 3, 1976), slip op. 2223, 2226. Moreover, Bradley advances no reasons, based upon either general principles or the facts of this case—in which the proof of guilt was overwhelming—to warrant any such abandonment of the settled authorities of this Court. In any event, the Supreme Court itself has said that where, as here, the trial court has properly instructed the jury on the standards for reasonable doubt, it is both confusing and incorrect further to instruct them that the Government's evidence, where circumstantial, must be such as to exclude every reasonable hypothesis other than that of guilt. *Holland v. United States*, 348 U.S. 121, 139-140 (1954). Accordingly, Bradley's claim merits no relief.

## POINT II

**The trial court properly restricted that portion of Bradley's cross-examination of Postal Inspector Jones which was designed to elicit certain of Bradley's self-serving, post-arrest declarations.**

Bradley vigorously contends that the trial court erred in restricting his cross-examination of Postal Inspector Jones, who testified as the primary witness to Bradley's various statements concerning "Tony," uttered both immediately after his arrest and at the Secret Service headquarters that afternoon.\* Defense counsel, on cross-examination, sought to elicit testimony concerning instances in the weeks following arrest, when Bradley voluntarily telephoned the Postal Inspectors seeking to discuss "Tony" and, apparently, locate him. The trial court ruled that defendant could not elicit such testimony on cross-examination without some showing of its relevance to this case, but held Mr. Jones available for recall by defendant should he so choose. The trial court's ruling was entirely proper.

With respect to the two-week period following arrest and the subject of Tony's identity, whereabouts and efforts to locate him, the Court permitted defense counsel

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\* The Government had sought, at the beginning of trial, a ruling that no statements made by Bradley after he left the check cashier's with the Postal Inspectors could be elicited by the defense on cross-examination, if they were not first raised by the Government on direct. The Court ruled, apparently under the doctrine of completeness, *McCormick on Evidence*, § 56 (1954), although it was not a writing which was in issue, see Rule 106, Federal Rules of Evidence, but rather two essentially simultaneous oral statements, that if the Government introduced Bradley's statement in which he claimed to be Francis Berger, the defense would be permitted to elicit Bradley's statements made that same day concerning Tony.

to inquire of Jones what he himself may have said and done, while prohibiting any cross-examination of Jones aimed at eliciting testimony of the content of statements on that subject made to him by Bradley. Any such statements of Bradley, clearly out-of-court declarations of a self-serving nature by a person other than the witness, were admissible only when offered by the Government as admissions of a party-opponent. Rule 801 (d) (2), Federal Rules of Evidence. Since the Government had not introduced them during its direct examination, the defendant was not free to inquire about them or to direct them as admissions, or indeed under any exception to the hearsay rule.

At a slightly later point the Court ruled altogether impermissible the entire line of questioning into the conduct and statements of Jones and Bradley pertaining to "Tony" which occurred within the two week period after arrest. The questioning was of no apparent relevance,\* and was clearly beyond the scope of the direct examination of Inspector Jones. Bradley made no appropriate offer of proof, and the Court directed that Jones remain available should Bradley wish to recall him after having made the relevance of the inquiry clear.

On this appeal, Bradley has made no more clear than he did to the Court below the purpose or relevance of the line of questioning he sought to conduct. As a result, he has utterly failed to show any impropriety in, or resultant prejudice from, the trial court's ruling.

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\* The proposed line of questioning did not seek to impeach the witness Jones by inconsistent statements, by showing bias or motive to testify, or otherwise. Perhaps Bradley was trying to establish that "Tony" existed, thereby reinforcing his statement concerning Tony, without regard for the obvious fact that even his "Tony" story provided him with no defense. At any rate, since he never informed the Court of the direction he intended, even that rationale is at most speculation.

This Circuit has repeatedly held, in accordance with the prevailing rule, that the trial judge has extensive discretion in controlling the scope and length of cross-examination. *United States v. Finkelstein*, 526 F.2d 517, 528-529 (2d Cir. 1975); *United States v. Kahn*, 472 F.2d 272, 282 (2d Cir. 1973), *cert. denied*, 411 U.S. 982 (1973); *United States v. Pacelli*, 491 F.2d 1108 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States v. DeMarco*, 488 F.2d 828, 831 n.8 (2d Cir. 1973); *see United States v. Alford*, 282 U.S. 687, 694 (1931). It has spoken of the conflict between the right of the defendant to establish a witness' bias or motive to lie, and the possibility of becoming sidetracked into mini-trials of collateral issues, and has upheld the trial court in its balancing of those conflicts. *United States v. Dorfman*, 470 F.2d 246 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1973). And it has emphasized that a clear abuse of discretion must be found for a ruling on the extent of cross-examination to require reversal. *United States v. Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States v. Lewis*, 447 F.2d 134 (2d Cir. 1971). Such an abuse of discretion rests, of course, on a showing of prejudice of the kind nowhere made by Bradley here. This Court has also noted that where the purpose of the inquiry is not made clear to the trial judge, his exercise of his discretion to preclude questions will be upheld. *United States v. Sanchez*, 361 F.2d 824 (2d Cir. 1966).

Furthermore, Rule 611, Federal Rules of Evidence, restricts the scope of cross-examination to those matters which were inquired into on direct examination, with exceptions solely in the discretion of the Court. That Rule also grants the trial court discretion to control the order and method of proof at trial. The Government at no time inquired of Inspector Jones concerning any telephone calls or other overtures of Bradley after his arrest, and the Court did direct that, should the defense wish to present such evidence affirmatively, it could do so at the appropriate time. It is therefore abundantly

clear that the Court properly exercised its discretion in curtailing cross-examination as it did.

### POINT III

**The trial court properly denied without a hearing Bradley's motion for a new trial premised on alleged impropriety in the jurors' deliberations.**

Bradley moved for a new trial on the basis of a letter from one of the jurors, received by the Court shortly after completion of the trial, expressing doubts about the correctness of the verdict. The Court denied the motion without a hearing. That disposition was entirely correct.

Immediately upon retiring for their deliberations in this case, in which the presentation of evidence had taken less than a day, the jury sent in a note asking for the indictment and the ten exhibits which had been received in evidence. Fifty minutes later they returned their verdict. A week later one of the jurors wrote Judge Carter, setting forth numerous doubts and second thoughts about the evidence and other matters at trial, and about opinions expressed by various jurors, which then troubled him. Defendant now contends that the juror's statements constitute an allegation of impropriety or bias on the part of the jury sufficient to warrant a hearing on his motion.

Since this Court's discussion in *United States v. Dioguardi*, 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 873 (1974), and contrary to Bradley's current claim, there is no confusion whatsoever concerning the propriety of ordering an evidentiary hearing when a juror attempts to impeach his verdict. The rule is clear that there can be no such inquiry into the jury's reasoning, its motives, and the discussion or process whereby it arrives at a

verdict, *id.* at 79, even where it is alleged that the jury disregarded or misunderstood the instructions of the judge. *McDonald v. Pless*, 238 U.S. 264 (1915); *Rotondo v. Isthmian Steamship Co.*, 243 F.2d 581 (2d Cir.), *cert. denied*, 355 U.S. 834 (1957). "[T]he strong public interest in the integrity of jury verdicts and the protection of jurors from harassment requires that investigation into the subjective motivations and mental processes of jurors not be permitted." *United States v. Green*, 523 F.2d 229, 235 (2d Cir. 1975).

By contrast, "courts have accepted the testimony of jurors to establish that impermissible *outside influences* were brought to bear on a jury" (emphasis added). *Ibid.*; accord, *United States v. Dioguardi*, *supra*, 492 F.2d at 79 n. 12. Inquiry into alleged "*internal abnormalities*" in a jury (*ibid.*) is proper, however, only where there is "clear and incontrovertible evidence of incompetence shortly before or after jury service, clear evidence of some criminal act, or evidence of some 'objective fact' of internal impropriety". *Id.* at 79. As examples of such "objective facts of internal impropriety" this Court in *Dioguardi* included a blood relation between a juror and the defendant, or the bringing of extraneous material to the jury's attention during its deliberations. See also *United States v. Dozier*, 522 F.2d 224, 226-228 (2d Cir. 1975). Even where such "objective facts" exist, courts proceed with utmost caution before permitting testimony at a hearing. *United States v. Dioguardi*, *supra*, 492 F.2d at 79 n. 12.

In the instant case, Mr. Elliott, the juror, has raised no hint whatever of tampering with the jury, or other external influence upon it. Nor is there an issue raised concerning the competency of any juror, a criminal act committed during deliberations, or any "objective fact" of internal impropriety. Mr. Elliott's doubts are directed solely to the mental processes of the jurors and the sort

of opinions and preconceptions which occur when any group of fourteen people,\* selected after careful voir dire, hears such uncontroverted evidence as was presented to the jury. His letter does not even suggest the sort of disregard for judge's instructions which the Supreme Court in *McDonald v. Pless, supra*, ruled immune from inquiry!

Under the circumstances, Judge Carter's denial of Bradley's motion without a hearing was wholly proper.

### CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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*United States Attorney for the  
 Southern District of New York,  
 Attorney for the United States  
 of America.*

CONSTANCE CUSHMAN,  
 JOHN C. SABETTA,  
*Assistant United States Attorneys,  
 Of Counsel.*

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\* Including alternates, to whom Mr. Elliott did refer in his letter.

AFFIDAVIT OF MAILING

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

Constance Cushman being duly sworn,  
deposes and says that she is employed in the office of  
the United States Attorney for the Southern District  
of New York.

That on the 12th day of April, 1976,  
she served a copy of the within brief by placing the same  
in a properly postpaid franked envelope addressed:

Martin Jay Siegel  
1140 Avenue of Americas  
New York, New York 10036

And deponent further says that he sealed the said envelope  
and placed the same in the mail box for mailing at One St.  
Andrew's Plaza, Borough of Manhattan, City of New York.

Constance Cushman

Sworn to before me this

16<sup>th</sup> day of April, 1976

Jeanette Ann Grayer  
JEANETTE ANN GRAYER  
Notary Public, State of New York  
No. 24-1541575  
Qualified in Kings County  
Commission Expires March 30, 1977